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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF HOUSTON, TEXAS,
Petitioner,

v.

ANNE M. GORSUCH, ADMINISTRATOR, and
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Clean Air Act and the "taking" clause of the Fifth Amendment of the United States Constitution permit the Administrator of the Environmental Protection Agency to refuse to consider natural conditions in promulgating primary and secondary national ambient air quality standards, even if the result may be to impose severe restrictions on human activity in a major city because of violations attributable to natural conditions.

2. Whether it was arbitrary, capricious and an abuse of discretion for the Administrator of the Environmental Protection Agency to reject evidence that mandatory control regulations for attaining the national ambient air quality standards for ozone will not work in Houston, Texas.

LIST OF PARTIES

The parties before the court of appeals included the City of Houston; the American Petroleum Institute and 15 of its member companies (Atlantic Richfield Company, Continental Oil Company, Exxon Company U.S.A., Getty Oil Company, Gulf Oil Corporation, Grace Petroleum Corporation, Kerr-McGee Corporation, Mobil Oil Corporation, Pennzoil Company, Shell Oil Company, Standard Oil Company (Indiana), The Standard Oil Company (Ohio), Texaco Inc., Union Oil Company of California, and Witco Chemical Corporation); the Chemical Manufacturers Association and four of its member companies (American Cyanamid Company, Diamond Shamrock Corporation, Ethyl Corporation, and Northern Petrochemical Company); the Commonwealth of Virginia, *ex rel.* the State Air Pollution Control Board; E. I. du Pont de Nemours & Company; the St. Louis Regional Commerce and Growth Association; the State of Oklahoma; the Natural Resources Defense Council; the Delaware Valley Citizens Committee for Clean Air, Inc.; the Connecticut Lung Association, Inc.; the American Lung Association; and the Sierra Club.

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Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of Houston, Texas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals [Appendix ("App."), *infra*] is not yet reported. The statements of basis and purpose for the regulations of the Environmental Protection Agency at issue in this case are reported at 44 Fed. Reg. 8202 (1979) and 44 Fed. Reg. 8237 (1979).

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to Supreme Court Rule 40.3, the caption of this case has been changed in this petition to reflect the fact that Anne M. Gorsuch has replaced Douglas M. Costle as Administrator of the Environmental Protection Agency.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution in pertinent part provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,
>
> * * * *
>
> nor shall private property be taken for public use, without just compensation . . . .

The Clean Air Act, in pertinent part provides:

Clean Air Act § 108, 42 U.S.C. § 7408

Air quality criteria and control techniques

(a) (2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on

> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and
>
> (C) any known or anticipated adverse effects on welfare.

Clean Air Act § 109, 42 U.S.C. § 7409

National primary and secondary ambient air quality standards

Protection of public health and welfare

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air. Such secondary standards may be revised in the same manner as promulgated . . . .

Clean Air Act, § 110, 42 U.S.C. § 7410

State implementation plans for national primary and secondary ambient air quality standards

Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which

provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and mainte-

nance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator.

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7425 of this title, relating to interstate pollution abatement . . . .

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section . . . .

The EPA regulations in issue in pertinent part provide:

National primary and secondary ambient air quality standards for ozone, 40 C.F.R. § 50.9

(a) The level of the national primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with Part 53 of this chapter, is 0.12 per part million (235 ug/m3). The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 part per million (235 ug/m3) is equal to or less than 1,

as determined by Appendix H. 44 Fed. Reg. 8220, col. 3 (1979).

* * * *

(7) In selecting an appropriate model to determine the amount of hydrocarbon reductions necessary to demonstrate attainment of the ozone standard, one of the following techniques must be applied:

(i) Photochemical dispersion models — These models are based on the most accurate available physical and chemical principles underlying the formation of ozone.

(ii) Empirical Kinetics Modeling Approach (EKMA)—This model represents a compromise between rigorous treatment of chemical and physical principles underlying ozone formation and dispersion and the extensive data requirement that would be necessitated by such an approach.

(iii) Empirical and statistical models—These models reflect observed relationships between ozone and other variables.

(iv) Proportional rollback—This model assumes a linear relationship between hydrocarbon emissions and ambient concentrations of ozone.

* * * *

(8) In developing an ozone control strategy for a particular area, background ozone concentrations and ozone transported into an area must be considered. States may assume that the ozone standard will be attained in upwind areas . . . .

Control strategy: Carbon monoxide, hydrocarbons, ozone, and nitrogen dioxide, 40 C.F.R. § 51.14

(a) *Priority I Regions.* (1) Each plan for a region classified Priority I with respect to carbon monoxide, ozone, or nitrogen dioxide shall set forth a control strategy which shall provide for the degree

of emission reduction necessary for attainment and maintenance of the national standard for each such pollutant after consideration of the emission reductions that will result from the application of Federal motor vehicle emission standards promulgated pursuant to section 202 of the Act.

(2) The plan shall contain: (i) A description of enforcement methods including, but not limited to, procedures for monitoring compliance with the selected traffic control measures, procedures for handling violations, and a designation of enforcement responsibilities (*i.e.*, air pollution control agency, State police, State Department of Motor Vehicles, State Registrator of Motor Vehicles, etc.)

(ii) Proposed or adopted rules and regulations pertaining to the selected transportation control measures.

(iii) A description of administrative procedures to be used in implementing all selected transportation control measures, including, but not limited to, methods of achieving transportation improvements and a designation of responsibility for administration of such procedures (*e.g.*, State Treasurer responsible for purchase of buses).

(iv) A schedule designating dates by which legal authority necessary to implement the plan will be obtained, other significant steps in the implementation of the plan will be achieved and each control measure will be implemented.

(b) *Control strategy development.* In a region in which attainment and maintenance of a national standard will require emission reductions in addition to those which will result from application of the Federal motor vehicle emission standards, the control strategy shall provide for application of such other measures as may be necessary for attainment and maintenance of such national standard.

(c) *Adequacy of control strategy.* (1) The plan shall demonstrate, by means of a proportional model or diffusion, photochemical model or other procedure which is adequate and appropriate, that the control strategy included in each plan for a region classified as priority I is adequate for attainment and maintenance of the national standard(s) to which such control strategy applies. Control measures shall not result in an increase in the concentration of any pollutant to a level that exceeds a national ambient air quality standard. The plan shall include provisions as necessary to prevent such increases in concentrations as a result of traffic increases that may be stimulated by transportation control measures . . . .

STATEMENT OF THE CASE

Ozone is produced in the atmosphere through complex chemical reactions between organic compounds ("precursors") and nitrogen oxides in the presence of sunlight. App. at 6a. "Precursors" include hydrocarbon emissions from vehicles and from industrial sources, and natural emissions from vegetation. *Id.* In addition, ozone from the stratosphere may intrude into the lower atmosphere. *Id.* In 1979, respondent Environmental Protection Agency ("EPA") promulgated regulations establishing national primary and secondary ambient air quality standards for ozone, pursuant to §§ 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408, 7409. 44 Fed. Reg. 8202 (1979), *codified* at 40 C.F.R. § 50.9 (1981). The regulations restrict the maximum permissible ozone levels, under both the primary and secondary standards, to 0.12 parts per million ("p.p.m."), which may not be exceeded more often than an average of one day in any three-year period. 44 Fed. Reg. at 8220. The standard must be met by December 31, 1982 or, with an extension for good cause shown, no later than December 31, 1987. 42 U.S.C. § 7502. At the same time, the EPA promulgated regulations that force the States, in draft-

ing implementation plans to carry out the new standard, to choose one of four "models" for determining the amount by which hydrocarbon emission must be reduced in order to achieve the ozone standard, 44 Fed. Reg. 8237 (1979), *codified at* 40 C.F.R. § 51.14(c)(7) (1981).

Petitioner, the City of Houston, Texas ("Houston"), participated in the rulemaking through its City Health Department. Houston was concerned that the City's high levels of ozone of natural origin would not be adequately considered by the agency in setting the standard and in establishing a workable control strategy. Even in the absence of emissions from industry, transportation or other human activity, natural sources in Houston create relatively high concentrations of ozone, making compliance with the standard impossible for the indefinite future. Rulemaking Record, II-D-97; VI-18; IIA-E(1)-47; Joint Appendix ("J.A.") 1613-16; 1621-29; 1651-55.

Houston presented evidence that natural sources generate ozone levels ranging from 0.04 to as high as 0.13 p.p.m. in the Houston area. Rulemaking Record, Houston Petition, II-D-97 at 45-46. High ozone levels have persisted in Houston despite a 40% reduction in man-made hydrocarbon emissions. *Id.* at 18-19.

The agency refused to consider natural conditions in Houston. EPA did recognize, however, that natural conditions may have a substantial effect upon ambient ozone levels. For example, in its brief to the court of appeals, EPA justified its "rolling three-year average" method of measuring compliance, which permits an average of one day per year in which the ozone level exceeds the standard for one hour or more, as an attempt to factor out "the effects of unusual weather conditions in any single year." EPA Brief to D.C. Circuit at 143, citing 43 Fed. Reg. 23,968 (1978) (notice of proposed rulemaking). In criticizing Houston's evidence that ozone emissions in the Houston area have not declined despite declining man-made hydrocarbon emissions, the agency insisted that a

much longer period of study is essential to factor out the effects of adverse weather conditions—thus, once again recognizing the impact of natural forces on ozone levels. 44 Fed. Reg. at 8235. In the preamble to the regulation, the agency also acknowledged that:

> The maximum ozone concentrations which will occur in any given time period will vary from one period to the next, even if precursor emissions remain constant. These variations are mainly due to the random nature of meteorological factors which affect the formation and dispersion of ozone in the atmosphere.

44 Fed. Reg. at 8218. The agency admitted that natural background levels of ozone may exceed 0.08 p.p.m. at a "not insignificant" rate, but contended, generally, that a natural level in excess of 0.12 p.p.m. "can be considered quite rare at any particular location." 44 Fed. Reg. at 8212.[2]

Because Houston's high total ozone levels have persisted even in the face of substantial reductions in local hydrocarbon emissions, J.A. 1269, 1651-55, Houston also expressed concern that a control strategy directed solely toward the further reduction of hydrocarbon emissions without any consideration of the impact of oxides of nitrogen emissions would not effectively reduce ozone levels in Houston. Rulemaking Record, II-D-97; J.A. 1613-15.

With respect to Houston's first concern—the problem of natural ozone—the court of appeals on review[3] re-

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[2] EPA referred generally to unspecified data which it had assertedly compiled over a number of years. *Id.*

[3] The court of appeals had jurisdiction to review the rulemaking under 42 U.S.C. § 7607.

jected Houston's argument that the 0.12 p.p.m. standard should be invalidated because natural conditions make attainment physically impossible. Relying upon its decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), the court of appeals approved EPA's refusal to consider whether the standards were economically or technologically feasible or even attainable at all. App. at 15a. Indeed, the court expressly ruled that "[a]ttainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards." *Id.* Citing *Natural Resources Defense Council v. EPA*, No. 79-1639 (D.C. Cir. filed May 7, 1981), the court of appeals added that the agency need not create local exceptions to national ambient air quality standards. *Id.* On the same theories, EPA also refused even to place in the rulemaking record one of its own studies of the impact of natural hydrocarbon emissions on ozone formation, which had been secured from the agency by the American Petroleum Institute, the petitioner in No. 81-871, under the Freedom of Information Act. J.A. 1003, 1073.

With respect to Houston's second concern—that EPA's prescribed control strategy would be ineffective—the agency rebuffed Houston's challenge to the mandatory hydrocarbon control strategy regulations by questioning Houston's evidence that declining hydrocarbon emissions in Houston have not reduced ozone levels. EPA argued that other studies support the general proposition that a reduction in hydrocarbon emissions will assist in the reduction of ozone levels; that Houston would have to collect data for five to eight years before its evidence would have any meaning; and that Houston's studies had failed to "normalize the trends for meteorological differences." 44 Fed. Reg. at 8235.

REASONS FOR GRANTING REVIEW[4]

I. The Agency and the Court of Appeals Erroneously Refused to Consider Whether the Ozone Standard Will Penalize Houston for Failing to Do the Impossible.

This case presents a novel issue of substantial and wide-ranging importance—whether the Clean Air Act permits the Administrator of the EPA to establish a national ambient air quality standard that is unlikely ever to be met by one of the largest cities in the United States, not because the standard is economically or technologically infeasible, but simply because natural conditions inevitably place that city in a position of noncompliance. In this case, the agency has refused to consider evidence that Houston may not meet the prescribed standard even if human activity in Houston were substantially reduced or eliminated entirely.

It need not be said that the Clean Air Act is designed to reduce human, not natural, emissions. The Act does not require the States to restrict the emissions of plant and animal life or to control the weather.[5] Nor may the Act be so construed. It is a basic principle of statutory construction that a statute should not be construed to require the absurd or the impossible. *See e.g., Quinn v. Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975) ("The construction of a statute leading to unjust or absurd consequences should be avoided."); *Melong v. Micronesian Claims Comm'n*, 569 F.2d 630, 634 (D.C. Cir. 1977) ("A construction . . . leading . . . to patent absurdity is obviously to be avoided"); *Brady v. City and County of*

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[4] Houston concurs with the petition of the American Petroleum Institute in No. 81-871, but shall not in this petition reiterate API's reasons for granting review.

[5] *See, e.g.*, 42 U.S.C. § 7410(a)(2), which provides that air quality standards are to be met by controls on emissions resulting from human activity, such as transportation controls, vehicle inspection programs, stationary source standards for the operation and new construction of manufacturing plants, and the like.

Denver, 508 P.2d 1254, 1256 (Colo. 1973) ("No provision of law should be interpreted in a way which requires an impossible task."). Here, the agency and the court of appeals would permit just such an absurd result by refusing even to consider the effects of climatic conditions and natural ozone sources. As one of the agency's Science Advisory Board[6] members noted, "if you were to go to the standard setting and set the standards lower than the natural background, this would be purely ridiculous." J.A. Ex. 2 at 100.[7]

The Congress may have intended to rely, in part, upon "technology forcing" (requiring future compliance with a standard that might be met only with the development of new technology), or may have accepted the possibility that businesses that could not find economically feasible means of compliance would be forced to close their doors.[8] It is inconceivable, however, that Congress, through the Clean Air Act, intended EPA to impose requirements that are unattainable because of nature and then to saddle one of the largest cities in the United States with a *futile* attempt to comply with an impossible air quality standard.[9]

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[6] Congress has required the agency to consult with a "Science Advisory Board" in the course of promulgating air quality standards. 42 U.S.C. § 4365. *See* the API petition in No. 81-871.

[7] In addition, a researcher for the National Science Foundation studying the "intrusion" of natural ozone from the stratosphere warned EPA that the level from intrusion alone could reach 0.25 p.p.m. for one hour, and wondered aloud as to what the agency would do if "Mother Nature" violated the standard. J.A. Ex. 1 at 4-51; Rulemaking Record IV-F-11 at 40, 43.

[8] *See* n.12, *infra*.

[9] The evidence in the rulemaking record has been further substantiated by the subsequent report of the National Commission on Air Quality, *To Breathe Clean Air* (1981), which concludes that Houston and several California cities will regularly exceed the standard even after 1987. *Id.* at 121, 126. EPA subsequently recognized, in part, the impossible burden which it has imposed

With the standard in place, Texas is obligated to produce a state implementation plan which will assure Houston's compliance by the final statutory deadline, December 31, 1987. 42 U.S.C. § 7410.[10] If Houston businesses cannot comply, they may be closed down.[11] Natural ozone levels will ensure that the net impact of any attempt at full compliance will be severe.[12] Given the

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upon Houston and other cities, and authorized Texas to submit a state implementation plan which would postpone Houston's day of reckoning beyond 1987. 46 Fed. Reg. 7182 (1981). EPA questioned its own statutory authority to permit such a delay; imposed a requirement of a particularly clear showing that the 1987 deadline cannot be met; and offered no opinion as to whether Houston could meet even such an extended deadline. *Id.* The agency's interpretation is no less absurd merely because the Clean Air Act contemplates a uniform national standard. Moreover, the only authority cited by the court of appeals for excusing the agency on this ground was its opinion in Natural Resources Defense Council v. EPA, No. 79-1639, slip op. at 34 (D.C. Cir. May 7, 1981). There, the court rejected an argument presented by the City of Anchorage, Alaska, to the effect that the city would have great difficulty monitoring compliance with the EPA's standards for water pollution because of the 30-foot tides in Cook Inlet and because of the presence of ice in the inlet in winter. Citing no authority, the court rejected the city's concerns with a one-sentence statement that because the Act contemplates national standards, the agency need not consider local compliance problems. However, the court was concerned that the regulations were unduly inflexible and relied, in part, upon EPA's assurance that the regulations "will be enforced with flexibility and discretion." *Id.* Here, by contrast, the standard may not be met at all due to natural conditions and no similar assurance has been offered.

[10] As noted above, n.9, it may now be possible for Houston to postpone this date for some period beyond 1987.

[11] In Union Elec. Co. v. EPA, 427 U.S. 246, 258-59 (1976), this Court noted that the Senate committee that considered the Clean Air Act "determined that existing sources of pollutants either should meet the standard of the law or be closed down . . ." S. Rep. No. 91-1196 91st Cong., 1st Sess. 2-3 (1970).

[12] Unlike an industrial business entity faced with serious compliance problems, Houston may not ask Texas to impose a heavier

indisputable premise of the Clean Air Act that the primary and secondary ambient air quality standards are to be achieved by controlling man-made emissions, whether through present or future control technology or by closing down emission sources, it was an error for the agency and the court of appeals to refuse to permit consideration of Houston's evidence that natural ozone levels would exceed or easily force Houston over the standard. The significance of this basic issue of statutory construction to Houston and to the other sectors of the United States which may face similar problems is substantial and warrants this Court's consideration.[13]

If the statute must be construed to permit the imposition of severe standards upon Houston with no prospect of compliance, due to natural conditions, then the Act must pass muster under the "taking" clause of the Fifth Amendment of the United States Constitution. This Court has identified two tests to be used to determine whether an unconstitutional taking has occurred: (1) whether the regulation is "not reasonably necessary to the eflectuation of a substantial public purpose"; or (2) whether it has an "unduly harsh impact upon the owner's use of the property." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). *See also Nectow v. City of Cambridge*, 277 U.S. 183 (1928). In this case, the regulations are not "reasonably necessary to the effectuation of a substantial public purpose" if forces of nature will cause them to be violated in Houston regardless of efforts to control man-made emissions and if, as

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burden on another area so that Houston may face less stringent controls. *See Union Electric, supra*, 427 U.S. at 266.

[13] In addition to Houston, EPA expects a "few" other urban areas to fail to comply with the standards by 1987. 46 Fed. Reg. 7182 (1981). A total of 24 states have requested extensions to 1987 to comply with the ozone standard. *Id.* at 7190. The National Commission on Air Quality expects at least 32 U.S. counties to be in violation of the standard after 1987. *To Breathe Clean Air* 143 (1981).

discussed below, the emission controls prescribed by the regulations are not effective in reducing ozone levels in Houston. The regulations are "unduly harsh" if, as the court of appeals found, Houston must attempt full compliance regardless of natural ozone levels.

II. The Agency Arbitrarily and Capriciously Rejected Houston's Evidence that EPA's § 110 Control Strategy Regulations Will Not Work in Houston.

EPA compounded its error in refusing to consider Houston's evidence of the impact of the natural production of ozone by also refusing to consider the impact of its control strategy regulations on Houston. Despite the evidence that substantial reductions of hydrocarbon emissions have not reduced ozone levels in Houston, EPA's prescription for compliance is to keep on requiring ever greater reductions in hydrocarbon emissions. EPA argues that Texas and Houston have discretion to impose additional controls on oxides of nitrogen on top of the mandatory hydrocarbon emission reductions if they choose. But EPA refused to consider the possibility that its regimen of hydrocarbon reductions would be a pointless exercise for the citizens of Houston.

The control strategy regulations are in the form of a directive that each State implementation plan for the attainment of the ozone standard shall contain provisions for the reduction of hydrocarbon emissions. The extent to which hydrocarbon emissions must be reduced is to be measured by one of four "models," each of which provides a separate method for projecting expected reductions in ozone, and all of which require substantial reductions of hydrocarbons. 40 C.F.R. § 51.14(c)(7) (1981).

Each of the "models" for measuring the probable success of state implementation plans in reducing ozone levels is based entirely upon the supposition that a reduction in hydrocarbon levels shall be uniformly

effective in all parts of the United States.[14] EPA's regulations therefore refuse to accept any state implementation plan that does not purport to reduce ozone levels to the standard by reducing hydrocarbon emissions. Even if there is to be only one, national, standard of air quality, it does not follow that the EPA therefore should be entitled to impose control strategies that do not and cannot work in particular areas, even with the imposition of draconian control measures.

In this case, Houston argued, *inter alia*, that its evidence demonstrated that the agency should consider the impact of the emission of oxides of nitrogen ("NOx") and the mix of such oxides with hydrocarbons in Houston. 44 Fed. Reg. at 8205.[15] EPA's response was that

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[14] One model, the "EKMA" model, permits some consideration of nitrogen oxide levels, but only if the City pursues an even greater reduction of hydrocarbon levels, which to date has been ineffective. EPA brief to D.C. Circuit at 140 n.134; J.A. 1645. In 1981, the agency proposed to eliminate the "proportional rollback" control strategy "model." 46 Fed. Reg. 7193 (1981).

[15] The correctness of Houston's position has been further confirmed by the subsequent report of the National Commission on Air Quality, *To Breathe Clean Air* 141 (1981), which concluded:

> Commission and other studies indicate that further control of both hydrocarbon and nitrogen oxides emissions will be necessary to enable areas exceeding the ozone standard to meet this standard (Shutler, 1980; SAI, 1980b). The basic chemistry of ozone formation from hydrocarbons and nitrogen oxides is well established and does not vary from site to site. However, the effect of controlling hydrocarbon or nitrogen oxides emissions will vary depending upon such local conditions as the ratio of hydrocarbon emissions to nitrogen oxides emissions in the atmosphere. The Commission's panel of experts stated that controlling hydrocarbons will almost always have a beneficial effect on reducing ozone levels except in areas with severe ozone non-attainment problems. [N.B.—such as Houston.] Control of hydrocarbon alone is more likely to have little or no effect where there are very high levels of hydrocarbons compared to the levels of nitrogen oxides. (Shutler, 1980).
>
> The role of nitrogen oxides in ozone production is an important factor in determining the benefits of controlling emissions of

Houston and Texas would have to determine for themselves what should be done with NOx emissions, drafting their own standards as necessary to comply with the national ozone standard. *Id.* In effect, EPA's response is that even if a reduction of hydrocarbon emissions in Houston would be pointless, Houston, while incurring the costs of such a futile exercise, could, *in addition*, adopt potentially efficacious NOx emission standards.

EPA also pointed to evidence in the record that supports the general proposition that ozone levels are dependent, at least in part, upon the level of hydrocarbons in the atmosphere. Even if this proposition is correct, it does not follow that the reduction of hydrocarbon emissions generated through human activity in the Houston area will reduce the ozone level in Houston to the 0.12 p.p.m. standard that EPA has set. EPA implicitly conceded as much when it attempted to discount Houston's data by arguing that Houston had not factored out Houston's climatological conditions. Indeed, the record is replete with evidence that climatological conditions may have a direct and immediate effect on ozone levels, as noted above. Moreover, EPA belittled Houston's evidence by applying it against an impossible standard—contending that only a study of up to eight years' duration could be considered accurate, and apparently believing that this was a good reason to refuse to confront the problem in the meantime. As to the impact of NOx emissions, EPA concluded only that its "data base" was

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hydrocarbons or nitrogen oxides. Emissions of nitrogen oxides can either reduce or increase ozone levels, depending on local conditions.

* * * *

After considering the costs and benefits of nitrogen oxides control, the Commission's panel of experts supported additional reasonable controls of nitrogen oxides. However, the panel emphasized that the complex behavior of hydrocarbons, nitrogen oxides, and ozone in the atmosphere dictates that different control plans should be developed for different areas of the country. (Shutler, 1980).

insufficient to establish the impact of ozone precursors other than hydrocarbons. 44 Fed. Reg. at 8205. EPA simply refused to come to terms with the question whether the control strategy would work in Houston.

EPA cited § 110 of the Clean Air Act as authority for the control strategy regulations. There can be no question, however, that § 110 of the Clean Air Act requires the Administrator to approve state implementation plans that are effective in attaining compliance with the national ambient air quality standards and to disapprove those that do not promise reasonable and timely attainment. This Court found as much in *Union Electric, supra.* There, the Court noted that the Administrator is obligated, under § 110, to consider whether it is feasible for a state plan to require more progress than it does, in order to achieve the primary standards "as expeditiously as practicable" and the secondary standards within a "reasonable time." 427 U.S. at 264-65 & n.13.

At a bare minimum, EPA should have considered the effectiveness of its compliance regulations in light of natural and climatological conditions. In light of the evidence that Houston will never be able to comply with the standard, EPA should have reviewed the question of an appropriate control strategy with exceptional care. At the very least, the cost of this futile effort could have been minimized and the reduction in ozone levels, even if insufficient to meet the standard, could have been maximized. EPA's cavalier dismissal of Houston's evidence as to the efficacy of the control strategy did not consider all relevant factors and therefore was arbitrary, capricious and an abuse of discretion.[16] In consequence,

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[16] The standard for review of the control strategy regulations is set forth in the Administrative Procedure Act at 5 U.S.C. § 706, which requires the Administrator to demonstrate a consideration of all relevant factors in promulgating regulations. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The air quality standards themselves are subject to review under separate standards set forth in the Clean Air Act. 42 U.S.C. § 7607.

EPA and the court below have required Houston not only to achieve the impossible, but also to pursue an ineffective means of trying to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1, 1981

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1104

AMERICAN PETROLEUM INSTITUTE, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

AMERICAN PETROLEUM INSTITUTE AND 15 OF ITS MEMBER COMPANIES, CHEMICAL MANUFACTURERS ASSOCIATION, THE ST. LOUIS REGIONAL COMMERCE & GROWTH ASSOCIATION, NATURAL RESOURCES DEFENSE COUNCIL, ET AL., THE STATE OF OKLAHOMA, E. I. DU PONT DE NEMOURS & CO., INTERVENORS

No. 79-1201

E. I. DU PONT DE NEMOURS AND COMPANY, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, and ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1222

AMERICAN PETROLEUM INSTITUTE, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, and DOUGLAS M. COSTLE, ADMINISTRATOR

No. 79-1290

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, and
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1335

THE NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1359

CHEMICAL MANUFACTURERS ASSOCIATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, and
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1362

THE CONNECTICUT LUNG ASSOCIATION, INC., PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1356

SIERRA CLUB, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 79-1365

COMMONWEALTH OF VIRGINIA, *ex rel.*
THE STATE AIR POLLUTION CONTROL BOARD, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY and
DOUGLAS M. COSTLE, ADMINISTRATOR, RESPONDENT

No. 79-1367

CITY OF HOUSTON, TEXAS, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGECY
and DOUGLAS M. COSTLE, ADMINISTRATOR, RESPONDENT

Petitions for Review of Orders of the
Environmental Protection Agency

Argued February 26, 1980

Decided September 3, 1981

Edward W. Warren with whom *Robert F. Van Voorhees, John S. Hahn, Stark Ritchie* and *David T. Deal* were on the brief, for American Petroleum Institute petitioner in Nos. 79-1104 and 79-1222 and intervenor in Nos. 79-1335, 79-1356 and 79-1362.

Roger L. Chaffe, Assistant Attorney General, for Commonwealth of Virginia, etc., petitioner in No. 79-1365. *Frederick S. Fisher* and *James E. Ryan, Jr.*, also entered appearances for Commonwealth of Virginia, etc., petitioner in No. 79-1365.

Courtenay Ellis with whom *David A. Donohoe* was on the brief, for City of Houston, Texas, petitioner in No.

79-1367. *Daniel Joseph* also entered an appearance for City of Houston, Texas, petitioner in No. 79-1367.

Richard Ayres with whom *David D. Doniger* was on the brief, for Natural Resources Defense Council, Inc., et al., petitioner in Nos. 79-1335, and 79-1362 and intervenor in No. 79-1104.

John H. Pickering, Andrew T. A. MacDonald and *Edmund B. Frost* were on the brief, for Chemical Manufacturers Association petitioner in Nos. 79-1290 and 79-1359 and Intervenor in Nos. 79-1104, 79-1335, 79-1356 and 79-1362. *David R. Johnson* and *John Stephen Lawrence, Jr.*, also entered appearances for Chemical Manufacturers Association, petitioner in Nos. 79-1290 and 79-1359 and intervenors in Nos. 79-1335, 79-1356 and 79-1362.

Joseph J. Brecher was on the brief, for Sierra Club, Petitioner in No. 79-1356. *Peter J. Herzberg* also entered an appearance for Sierra Club, petitioner in No. 79-1356.

Patrick K. O'Hare, Attorney, Environmental Protection Agency and *Patrick J. Cafferty, Jr.*, Attorney, Department of Justice with whom *Angus Macbeth*, Acting Assistant Attorney General, *Donald W. Stever*, Attorney, Department of Justice and *Gerald K. Gleason*, Deputy Associate General Counsel, Environmental Protection Agency were on the brief, for respondents. *Jeffrey O. Cerar*, Attorney, Environmental Protection Agency also entered an appearance for respondent, Environmental Protection Agency.

Christopher S. Bond and *Charles A. Blackman* were on the brief, for the St. Louis Regional Commerce and Growth Association, intervenor in Nos. 79-1104, 79-1335, 79-1356 and 79-1362.

Charles S. Rogers, Assistant Attorney General, State of Oklahoma also entered an appearance for State of Oklahoma, etc., intervenor in No. 79-1104.

Robert R. Bonczek, Carl B. Everett, and *Bernard J. Reilly* also entered appearances for E.I. DuPont De Nemours and Company petitioner in No. 79-1201 and intervenor in Nos. 79-1104, 79-1335, 79-1356 and 79-1362.

Before: ROBB, WALD and MIVKA, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBB.

Opinion dissenting in part filed by *Circuit Judge* WALD.

ROBB, *Circuit Judge*: The petitions for review consolidated in this case challenge the primary and secondary national ambient air quality standards[1] for ozone promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act, as amended. 42 U.S.C. §§ 7401, et seq. (Supp. III 1979). EPA established both the primary and secondary standards for ozone at 0.12 parts per million (ppm) in final regulations published on February 8, 1979. 44 Fed. Reg. 8202. Petitioners American Petroleum Institute (API), *et al.*, the City of Houston, and the Commonwealth of Virginia contend that the Administrator of EPA erred by establishing too stringent standards. Petitioner National Resources Defense Council (NRDC), et al., argues that the Administrator erred by establishing standards that are too lenient. Various petitioners raise procedural challenges, and certain petitioners challenge regulations which implement the standards. We uphold the ozone standards because they are proper under the Act and such procedural errors as did occur do not require invalidation of the final standards.

I.

The standards challenged in this case establish restrictions on permissible levels of ozone. As with other photochemical oxidants, ozone is not emitted directly into the air, but is produced by complex chemical reactions

[1] These regulations are codified at 40 C.F.R. § 50.9(a) (1980).

between organic compounds (precursors) and nitrogen oxides in the presence of sunlight. Oxidant precursors are organic compounds which can occur naturally but are in large measure man-made. Sources of precursors include automobile emissions of hydrocarbons, chemical plant emissions, and gasoline vapors. Photochemical oxidant concentrations can also exist where ozone from the stratosphere intrudes into the lower atmosphere or where naturally occurring nitrogen oxides react with hydrocarbons produced by vegetation. Although ozone is but one of many photochemical oxidants, total oxidant pollution has been measured by reference to the ozone level in the air since 1971.

Ozone is the primary cause of the ill effects associated with smog, of which it usually comprises 65-100%. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosone structure. Ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering.

The goal of the Clean Air Act is to protect the public health and welfare by improving the quality of the nation's air. 42 U.S.C. § 7401(b). Improved air quality is accomplished by the establishment of national ambient air quality standards (NAAQS) and by implementation thereof through state programs to control local sources of pollution. 42 U.S.C. § 7410. The Act directs the Administrator to establish two types of NAAQS. Primary ambient air quality standards are "standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

Secondary standards "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 7409 (b) (2). State control programs must provide for the attainment of primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of aproval of such plan . . ." 42 U.S.C. § 7410 (a) (2) (A) (i). State programs that implement secondary standards must specify a "reasonable time at which such secondary standard will be attained". 42 U.S.C. § 7410 (a) (2) (A) (ii). Thus, the ozone standards at issue in this case must be implemented through state plans within three years for the primary standard and within a reasonable time for the secondary standards.[2] *Lead Industries Ass'n v. EPA*, No. 78-2201 (D.C. Cir. June 27, 1980) slip op. at 7-8, cert. denied, 49 U.S.L.W. 3428 (Dec. 8, 1980).

EPA promulgated primary and secondary standards for photochemical oxidants (i.e., ozone) in 1971. Both standards were established at an 0.08 ppm hourly average not to be exceeded more than once a year. 36 Fed. Reg. 8187 (1971). The method used to determine compliance with the 1971 standards measured only ozone. 43 Fed. Reg. 26967 (1978). In 1976 EPA began to revise the 1971 standards and in April 1977 requested data and information relevant to the revision. 42 Fed. Reg. 20493 (1977).

As part of the revision, EPA established a working group within the Criteria and Special Studies Office of its Office of Research and Development to develop a

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[2] Under 42 U.S.C. § 7501 (a) (2) a state that cannot meet the NAAQS for ozone by December 31, 1982 despite the implementation of "all reasonably available measures" may seek approval of a plan that extends the deadline for compliance to December 31, 1987.

"criteria document". A criteria document "accurately reflect[s] the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2); *see* 42 U.S.C. § 7409(a). In the early stages of preparing the ozone criteria document EPA retained a panel of expert environmental consultants (the Shy Panel) and sought their opinions on the ozone concentration levels at which adverse health effects might be experienced. The Shy Panel concluded that "short term exposures to ozone in the range of 0.15 to 0.25 ppm may impair mechanical function of the lung, and may induce respiratory and related symptoms in sensitive segments of the population". (J.A. 270) The panel recommended that the primary standard remain at 0.08 ppm. (J.A. 277) The panel's recommendations and conclusions were included in the draft criteria document.

In 1974 the Administrator of the EPA established a Science Advisory Board (SAB) to assist in establishing NAAQS, among other functions. During the revision of the ozone standards Congress passed the Environmental Research, Development, and Demonstration Authorization Act of 1978, PUB.L. 95-155, 91 Stat. 1260 (1978) (ERDDAA), which requires the Administrator to submit to the SAB any "proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the [EPA] . . . on which the proposed action is based." 42 U.S.C. § 4365(e). During the revision of the ozone standard the SAB reviewed two full drafts and a third draft of the summary chapter of the ozone criteria document and offered comments on its content. After examining the summary of the third draft, six of the eleven SAB members voted to approve the criteria document, with reservations and recommended changes. Two members rejected the document, and three members offered no judgment. The parties dispute the

effect of this "approval" under the Clean Air Act. Neither the final criteria document nor the final ozone standards were made available to the SAB for comment.

As a further aid to the Administrator in establishing the ozone standards, EPA conducted a "risk assessment study". This study combined medical opinions as to the necessary ozone levels for creation of certain adverse health effects (e.g., aggravation of emphysema) with predictions as to peak ozone levels in a five-year period. (J.A. 561-73) The study attempted to predict the probability of creating certain health problems under various possible standards. The Shy Panel relied on the results of this study in recommending that the primary standard remain at 0.08 ppm. Although the risk assessment study results were summarized in the preamble to the final regulations, 44 Fed. Reg. 8216 (1979), the Administrator acknowledged that the method used in arriving at the results was not completely reliable. 44 Fed. Reg. 8210-11 (1979). The parties dispute whether the results of the risk assessment study played a significant role in the establishment of the ozone standards.

On June 22, 1978 EPA published the proposed primary and secondary standards for ozone. 43 Fed. Reg. 26962. The proposed primary standard was raised to 0.10 ppm, while the proposed secondary standard remained at 0.08 ppm. EPA also proposed a revision in the measuring standard (the one-exceedance-per-year attainment measure) by substitution of a new standard. Under the old standard, as long as the 0.08 ppm standard was not exceeded more than once a year, the standard was met. The new measuring standard is met when "the expected number of hour[s] per calendar year with concentrations above 0.10 ppm is less than or equal to one [over a three year period]". 43 Fed. Reg. 26968 (1978). In setting the proposed primary standard at 0.10 ppm the Administrator relied on studies showing adverse health effects at ozone concentrations of 0.15 to 0.35 ppm. 43

Fed. Reg. 26966 (1978). He also relied on medical opinions and some of the conclusions of the risk assessment study. *Id.* at 26966-67. The proposed secondary standard was based on predictions as to the effects of certain ozone concentrations on crop yields due to leaf damage. 43 Fed. Reg. 26969 (1978).

After publication of the proposed standards, EPA conducted four public hearings on the standards and received numerous comments. Various governmental agencies commented on the proposed standards, including the Departments of Interior, Energy, and Transportation, the United States Public Health Service, the Virginia Air Pollution Control Board, and various White House officials. 44 Fed. Reg. 8206-07 (1979). Some of these comments occurred after the official comment period closed and are the subject of dispute in this case.

In February 1979 EPA published final primary and secondary standards for ozone, raising both to 0.12 ppm. 44 Fed. Reg. 8202. The Administrator determined that "the most probable level for adverse health effects in sensitive persons, as well as in healthier (less sensitive) persons who are exercising vigorously, falls in the range of 0.15 to 0.25 ppm." 44 Fed. Reg. 8216 (1979). He based his conclusion on the criteria document, the comments submitted on the proposed standards, the report of the Shy Panel, and medical opinions collected during the risk assessment study. 44 Fed. Reg. 8215-16 (1979). The Administrator also concluded that the 0.12 ppm standard provides an adequate margin of safety. 44 Fed. Reg. 8216-17 (1979). He raised the proposed secondary standard based on a determination that average daily maximum ozone concentrations of 0.12 ppm would not harm crop yields. 44 Fed. Reg. 8217-18 (1979). Finally, in addition to establishing ozone standards, EPA published four models for determining the amount of hydrocarbon reduction necessary to meet the standards. 44 Fed. Reg. 8234 (1979). No petitions for reconsideration

of the standards were filed with EPA. Petitions for review pursuant to 42 U.S.C. § 7607(b)(1) followed.

II.

Issues Presented By The Petitions

The petitions for review present both substantive and procedural challenges to the primary and secondary ozone standards promulgated by EPA. Some petitioners contend that the standards are irrational and unsupported by the record. Other petitioners argue that the standards do not contain an adequate margin of safety, are too stringent given naturally occurring ozone levels, and are not economically feasible. It is also argued that the measurement standards and control strategies promulgated by EPA are unreasonable and unsupported by the record. As to the procedural allegations, it is argued that the Administrator erred in his use of the Science Advisory Board, the Shy Panel, and the risk assessment study. Various petitioners contend that certain items excluded from the record should have been included, while other petitioners argue that some material was untimely inserted in the record. After discussing the standard of review which governs petitions for review under the Clean Air Act, we address each significant argument in turn.

III.

Standard Of Review

Section 307 of the Clean Air Act provides, in relevant part:

* * * *

> (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quailty standard . . . may be filed only in the United States Court of Appeals for the District of Columbia.

* * * *

(d) (1) This subsection applies to —

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title.

* * * *

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of . . . [a timely objection] has been met, and (iii) [the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made] . . . .

* * * *

42 U.S.C. § 7607.

These provisions of the Act assign this court a restricted role in reviewing air quality standards. *Lead Industries Ass'n, Inc. v. EPA*, *supra* at 30. The Administrator's construction of the Act will be upheld if it is reasonable, *id.* at 29-30, and though it is our duty to

undertake a "searching and careful" inquiry into the facts, our view of the evidence "is not designed to enable us to second-guess the agency's expert decision-maker." *Id.* at 26, 27. Reversal for procedural defaults under the Act will be rare because the court must first find that the Administrator was arbitrary or capricious, that he overruled a relevant and timely objection on the point in question, and that the errors were so significant that the challenged rule would likely have been different without the error. 42 U.S.C. § 7607(d)(9)(D); *Sierra Club v. Costle*, No. 79-1565 (D.C. Cir. April 29, 1981) slip op. at 182-83, 193-94.

IV.

Substantive Challanges To The Ozone Standards

Petitioner American Petroleum Institute contends that the primary ozone standard is not rational because, it alleges, no adverse health effects have been proven below 0.25 ppm with two hours exposure. (Br. for API at 31-44) API also argues that EPA must consider whether the 0.12 ppm standard is attainable and whether the anticipated costs of meeting that standard are justified when compared with the results to be achieved. *Id.* at 51-68. Petitioner Houston contends that the ozone standards are arbitrary and capricious because natural ozone levels and other physical phenomena in the Houston area prevent it from meeting the standards. (Br. for Houston at 4-22) Houston argues that the standards are also arbitrary and capricious because the control strategies promulgated by EPA will not reduce ozone levels. *Id.* at 22-26.

Petitioner Commonwealth of Virginia contends that EPA acted arbitrarily and capriciously in retaining the single hour averaging test for measuring compliance with the ozone standards. Virginia argues that the method chosen is not supported by logic or medical evidence, is costly, and will have no demonstrable bene-

ficial effect on air quality. (Br. for Virginia at 3-13) Petitioner Natural Resources Defense Council contends that the Administrator misinterpreted the Act in adopting standards for ozone alone and thus rescinding existing standards for other photochemical oxidants. (Br. for NRDC at 35-44) NRDC also argues that the Administrator failed to establish an adequate margin of safety in the primary ozone standard. *Id.* at 44-66.

API's argument that the Administrator erred in not considering attainability and cost justifications for the ozone standards was specifically rejected in the *Lead Industries* case, *supra* at 32. We stated there that under section 109 of the Act "the Administrator may not consider economic and technological feasibility in setting air quality standards . . . [because] of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals." *Lead Industries, supra* at 33. In a lengthy analysis of the Act and its legislative history we concluded that the "technology-forcing" requirements of the Act were expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible. *Lead Industries, supra* at 34-35.

API's other argument is that the standards are not supported by substantial evidence. We reject this argument because the record is replete with support for the final standards. The studies discussed in the criteria document constitute a rational basis for the finding that adverse health effects occur at ozone levels of 0.15 to 0.25 ppm for sensitive individuals. We need not find that each study discussed in the criteria document is accurate and reliable. The proper function of the court is not to weigh the evidence anew and make technical judgments; our role is limited to determining if the Administrator made a rational judgment. We find that the Administrator's conclusion that normal body functions are "disrupted" at low ozone levels, 44 Fed. Reg. 8213

(1979), is supported by the studies of De Lucia and Adams (effects at 0.15 to 0.30 ppm) (J.A. Ex. 1 at 9-18, Hazucha (effects as 0.25) (J.A. Ex. 1 at 1-15), Wayne (effects at 0.15) (J.A. Ex. 1 at 10-57), Herman (effects at 0.15 to 0.39) (J.A. Ex. 1 at 1-22-23), among others indicated in the record. The court finds no reason to hold that the Administrator abused his discretion in crediting the various studies relied on, even the acknowledged uncertainties in some of the conclusions. The Administrator noted that "a clear threshold of adverse health effects cannot be identified with certainty for ozone." 44 Fed. Reg. 8213 (1979). Because the Administrator acknowledged the uncertainty of his task and made a rational judgment, we cannot second-guess his conclusion. *Lead Industries, supra,* at 25-28; *See Motor & Equipment Manufacturers Ass'n v. EPA,* 201 U.S. App. D.C. 109, 119-20, 627 F.2d 1095, 1105-06 (1979), *cert. denied,* 446 U.S. 952 (1980); *Hercules, Inc. v. EPA,* 194 U.S. App.D.C. 172, 598 F.2d 91 (1978).

Houston's argument that because natural factors make attainment impossible the Administrator acted arbitrarily and capriciously in setting the primary ozone standard at an "unattainable" level is addressed in part by our analysis of API's attainability argument. Attainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards. *Lead Industries, supra* at 32-33. Further, the agency need not tailor national regulations to fit each region or locale. *NRDC v. EPA,* No. 79-1639 (D.C. Cir. May 7, 1981) slip op. at 34. We also note that compliance extensions are available in some cases, 42 U.S.C. § 7501(a)(2) (Supp. III 1979), and that Congress is aware that some regions are having difficulty in meeting the national standards. *See* 42 U.S.C. § 7501, *et seq.* (Supp. III 1979) (Part D of Title I, setting special requirements for states which have not met standards).

Houston also contends that EPA's strategies for deducing ozone concentrations rely on a faulty premise: that ozone is caused in part by high concentrations of

hydrocarbons in the air. In arguing this point Houston relies on a study which allegedly establishes that reduction of hydrocarbon levels will not reduce ozone levels.[3] The study in question was considered by EPA and rejected on several grounds which undercut the reliability of its conclusions. 44 Fed. Reg. 8235 (1979). Because control of ozone by reduction of hydrocarbon levels is an established methodology (J.A. Ex. 1 at 1-2, 1-3) and because Houston's record evidence in rebuttal is sparse, we cannot find that the Administrator is wrong on this issue.

Petitioner Commonwealth of Virginia challenges the method which EPA selected to measure compliance with the primary standard. The method chosen by EPA measures the highest average ozone level in any one hour to determine compliance. 44 Fed. Reg. 8217-18 (1979). Virginia argues that it would be better to use a daily average ozone level to measure exposure. We find that the Administrator's selection of the maximum hourly average method is reasonable because it is calculated to measure the maximum exposure, which has been found to be a relevant factor in determining the likely consequences of ozone exposure.

Petitioner National Resources Defense Counsel argues that the Administrator has abdicated responsibility for regulation of photochemical oxidants other than ozone by relabeling the regulations here at issue. In 1971 when the first air quality standards were promulgated, the title of the regulation was "National primary and secondary ambient air quality standards for photochemical oxidants". 36 Fed. Reg. 8187 (1971). The title was some-

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[3] Houston also appended to its brief as Exhibit A a recent study which it contends supports its position in this regard. That exhibit is not part of the record and cannot undercut the Administrator's conclusions on review. 42 U.S.C. § 7607(d)(7)(A) (Supp. III 1979); *see* American Petroleum Institute v. Costle, 197 U.S. App. D.C. 254, 609 F.2d 20 (1979).

what misleading because the 1971 standards applied only to ozone, which was the sole photochemical oxidant measured for compliance. 43 Fed. Reg. 26967 (1978). The new standards challenged in this case expressly apply only to ozone and do not attempt to establish permissible levels for other photochemical oxidants. 43 Fed. Reg. 26985 (1978).

Despite NRDC's characterization of the Administrator's action, it appears that EPA has not abandoned its statutory responsibility to regulate pollutants which "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (Supp. III 1979). Rather, the Administrator has chosen to regulate the photochemical oxidant (ozone) that, in his judgment presents a predictable danger. (J.A. Ex. 1 at 1-31) The setting of the ozone standard is not the only action taken by the agency with regard to photochemical oxidants; research concerning the less well known oxidants continues. 44 Fed. Reg. 8204 (1979). The Administrator's approach to photochemical oxidants is reasonable, given the uncertain information concerning the class as a whole.

NRDC also argues that the Administrator failed to establish an adequate margin of safety in the primary standard. As required by the statute, the Administrator promulgated air quality standards that are calculated to "protect individuals who are particularly sensitive to the effects of pollution." *Lead Industries, supra,* at 43. In setting margins of safety the Administrator need not regulate only the known dangers to health, but may "err" on the side of overprotection by setting a fully adequate margin of safety. *See Environmental Defense Fund v. EPA*, 194 U.S. App. D.C. 142, 161-62, 598 F.2d 62, 80-81 (1978). Of course the Administrator's conclusions must be supported by the record, and he may not engage in sheer guesswork. Where the Administrator bases his conclusions as to an adequate margin of safety on a reasoned analysis and evidence of risk, the

court will not reverse. NRDC argues that the Administrator erred in setting a primary standard that does not protect sensitive individuals against easily predicted risks. In so arguing NRDC essentially ignores the mixed results of the medical studies evident in the record, choosing instead to rely only on the studies that favor its position. The Administrator, however, was required to take into account all the relevant studies revealed in the record. Because he did so in a rational manner we will not overrule his judgment as to the margin of safety.

The Administrator concluded that the medical evidence "suggest[ed] the real possibility of significant human adverse health effects below 0.15 pp. Consequently . . . [he] determined that a standard of 0.12 ppm is necessary and is sufficiently prudent unless and until further studies demonstrate reason to doubt that it adequately protect public health". 44 Fed. Reg. 8217 (1979). Having determined that the "probable level for adverse effects in sensitive persons is in the range of 0.15-0.25 ppm", 44 Fed. Reg. 8216 (1979), the Administrator considered the evidence in the record that related to less predictable risks of ozone exposure, a relevant consideration in setting margins of safety. The Administrator considered the lack of medical evidence concerning especially sensitive persons, the possibility that ozone and other pollutants might combine to create cumulative effects, the significance of long-term exposure to otherwise safe ozone levels, inconclusive studies indicating very low ozone damage thresholds, and uncertainties arising from meterological and calibration errors in measurements. *Id.* The Administrator also indicated that the results of the risk assessment study, described at page 4, *supra*, did not support any safety margin above 0.12 ppm. 44 Fed. Reg. 8217 (1979). Given the nature of the task assigned to the Administrator, which is to make an informed judgment based on available evidence, we find that the Administrator's selection of a margin of safety is rational. *See Lead Industries, supra* at 62.

V.

PROCEDURAL CHALLENGES

Petitioners allege numerous procedural errors: EPA's relationship with the Science Advisory Board (SAB) and Advisory Panel on Health Effects of Photochemical Oxidants (Shy Panel), post-comment period contacts between EPA and the White House, exclusion of documents from the record, and last-minute additions to the record by EPA.

Under the procedural provisions of the Clean Air Act, 42 U.S.C. § 7607(d), we may invalidate the ozone standard because of procedural error only if (1) the agency's failure to observe procedural requirements was arbitrary and capricious, (2) an objection was raised during the comment period, or, where the grounds for such an objection arose after the comment period and the objection is of "central relevance to the outcome of the rule," the objection was raised on a petition for reconsideration before the agency, and (3) "the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(7) & (8). As we noted in *Sierra Club v. Costle*, *supra* at 183, "[t]he essential message of so rigorous a standard is that Congress was concerned that EPA's rulemaking not be casually overturned for procedural reasons, and we of course must respect that judgment."

1. *Science Advisory Board (SAB)*

API and Houston contend that in promulgating the ozone standards EPA violated section 8(e) of ERDDAA, 42 U.S.C. § 4365(e) (Supp. III 1979) by failing to obtain approval of the criteria document from the SAB and to submit the proposed standards to the SAB for review. Section 8(e) provides, in relevant part, that

> (e) (1) The Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the Clean Air Act . . . is provided to any other Federal agency for formal review and comment, shall *make available* to the [Science Advisory] Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information . . . .
>
> (2) The Board *may make available* to the Administrator, within the time specified by the Administrator, its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession. (Emphasis supplied)

The language of the statute indicates that making a proposed criteria document and standard available to the SAB for comment is mandatory but that SAB approval is not required before proceeding to the final stage of rulemaking. This interpretation is supported by the Conference Report underlying this provision of the ERDDAA, which states in pertinent part that

> The Science Advisory Board is intended to be advisory only. The Administrator will still have the responsibility for making the decisions required of him by law. The reviews and comments of the Board are to be provided to the Administrator for his use. . . .

H.R. REP. NO. 95-722, 95th Cong., 1st Sess. 16 (1977). While "the intent of [the statutory] language is to insure that the Board is able to comment in a well-informed manner on any regulation that it so desires", "it should not be mandatory that they comment on all proposed regulations. . . ." *Id.* at 17 and 16. In short, the EPA was required under ERDDAA to submit the criteria document and standard to the SAB for comment, but it was not obligated

to obtain SAB approval of either before promulgation of a final standard.

The parties do not dispute that EPA submitted two drafts of the criteria document to the SAB and that substantial revisions were requested by the Board. The SAB agreed to cast ballots indicating approval or disapproval of the document based upon a third draft of only the "summary and conclusions" chapter of the document. After submission of the chapter, six of the eleven members of the SAB voted to approve the document subject to (1) stated reservations and (2) the assumption that the revised chapter accurately reflected corresponding changes in the entire document. (J.A. at 289-306) Two SAB members found the documents unacceptable, and the remaining three said that they were unable to make a judgment at that time. *Id.* The petitioners contend that the final criteria document, which was never submitted to the SAB, did not incorporate the changes requested by the Board, while EPA argues that the final criteria document adequately addressed the SAB's concerns.

The EPA action does not constitute a violation of section 8(e) of the ERDDAA. The Act requires only that the EPA submit the criteria document to the Board for advice and comment; it does not require that the Administrator obtain approval of the SAB or incorporate all suggested changes. While it might have been preferable for the EPA to have submitted the final criteria document to the SAB, we note that the SAB itself agreed to the course followed. (J.A. Ex. 2 at 563, 578) Given the extent of SAB comment on the criteria document, we cannot find that the document was not "made available" to the Board within the meaning of Section 8(e).

The proposed ozone standard, on the other hand, was never made available to the Board for advice and comment. Section 8(e) makes the submission of any proposed standard to the SAB mandatory. EPA contends that because the standard is based on the criteria document, submission

of the standard to the SAB would have been redundant. This argument is unpersuasive; the statute explicitly mandates that standards be submitted to the Board for review. Accordingly, the failure to submit the standards was a violation of procedure required by law. We cannot find, however, that this error was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed" had the proposed standards been submitted to the SAB. 42 U.S.C. § 7607(d)(8). The final standard of 0.12 ppm represents an allowance for a margin of safety in light of the adverse health effects range stated in the criteria document (0.15-0.25 ppm). Because any SAB review of the standard would have involved review of the criteria document, i.e., the scientific and technical basis for the standard, we cannot hold that the standard would likely have been significantly changed had it been submitted to the Board. The Administrator's final standard, as noted *supra* at 8, is rational and supported by the record. Although the failure to submit the proposed standards to the SAB was a violation of section 8(e) of the ERDDAA, the circumstances indicate that the error was not so central as to constitute grounds for invalidating the final standards.

2. *Shy Health Effects Panel and Risk Assessment Study*

API and Houston also argue that the EPA Advisory Panel on Health Effects of Photochemical Oxidants (Shy Panel) was an advisory committee within the meaning of the Federal Advisory Committee Act (FACA). 5 U.S.C. app. I, § 1 *et seq.* (Supp. I 1977). Petitioners assert that because EPA failed to observe several requirements of FACA, the actions of the Shy Panel and the EPA reliance on the panel's risk assessment study require invalidation of the standard.

In early 1977 EPA officials responsible for developing the ozone standard asked Dr. Carl Shy of the Institute for

Environmental Studies, University of North Carolina at Chapel Hill, to head a panel of paid environmental experts which would prepare "a detailed report on the translation of health data into an ambient air quality standard for photochemical oxidants." (Br. of API at 20) Dr. Shy was a leading advocate of the existing 0.08 ppm ozone standard. *Id.* The panel met privately on June 7 and 8, 1977. A first draft of the panel report, co-authored by Shy and an EPA official, strongly endorsed the existing 0.08 standard. Following some minor revisions, the final draft of the Shy Panel report was submitted to the EPA in late 1977, made available for public comment in December 1977, and placed in the rulemaking docket on March 22, 1978. (Br. of EPA at 126) The report, which used a "risk assessment" technique to conclude that 0.08 ppm was the proper ozone standard, was made part of the criteria document and cited as one of the bases for the final 0.12 ppm standard. (Br. of API at 29)

The FACA defines an advisory committee, in relevant part as "any . . . panel . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies . . . ." 5 U.S.C. app § 3(2)(C). Petitioners contend that because the Shy Panel clearly is an advisory committee within the meaning of this provision, the conduct of the panel violates several provisions of FACA and that EPA reliance on the panel's study as a basis for the final rule requires invalidation of the standard. For example, it is argued that the choice of a known partisan to chair the panel violates the FACA requirements that the committee be "fairly balanced" and that it not be "inappropriately influenced" by any "special interest." 5 U.S.C. app. § 5(b)(2)-(3). It is also asserted that the private meetings of the panel violate the FACA requirement that public notice and opporunity for public participation be given. 5 U.S.C. app. §§ 10(a)(2) and (d)(3). EPA asserts, on the other hand, that the Shy Panel is not subject to FACA because the group con-

sisted of paid consultants and the legislative history of FACA indicates that the Act was not intended to apply to persons having contractual relationships with the government. CONF. REP. NO. 92-1403, 92d CONG., 2d SESS. (1972). *See Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd mem.*, 178 U.S. App.D.C 277, 546 F.2d 1043 (1976), *cert. denied*, 431 U.S. 932 (1977). In any event, argues EPA, none of the Shy Panel actions violated FACA.

We need not reach the questions whether the Shy Panel was an advisory committee within the meaning of FACA and whether violations of FACA occurred. Even were we to find that the panel was subject to FACA, that violations of the Act occurred, and that reliance on the risk assessment study was therefore illegal, we would not be able to say that there is a substantial likelihood that the 0.12 ppm standard would have been significantly different if such errors had not been made. The ultimate adoption of a 0.12 ppm standard constitutes a rejection of the Shy Panel's conclusion that the ozone standard should not be relaxed. Moreover, even though the Shy Report was cited as one of the bases for the final standards, the criteria document otherwise fully supports the 0.12 ppm standard as a figure representing a margin of safety below the 0.15-0.25 ppm danger zone. In short, absent the Shy Panel report, there is a substantial likelihood that the standard would have been the same. We therefore cannot invalidate the standard based on the alleged procedural irregularities.

3. *EPA Exclusion of API Submission Regarding Natural Hydrocarbons*

API asserts that the EPA erred in failing to consider and by excluding from the docket and record an API post-comment period submission concerning natural organic emissions from vegetation.

Section 307(d)(4)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(4)(B) requires the Administrator to place in the docket all documents, even those not submitted during the comment period, determined to be "centrally relevant" to the rulemaking. API, in submitting the above documents, noted in its request that they related to the issue of whether "attainment of the proposed standards would be precluded in most areas of the nation by natural background levels of ozone resulting in part from natural hydrocarbon emissions." (J.A. at 1003) EPA refused to docket most of the documents submitted by API on the ground that the question of attainability is not relevant to the setting of ambient air quality standards under the Clean Air Act. As noted, *supra* at 10, the EPA position that attainability is not central to a rulemaking of this type is correct. Accordingly, EPA's decision to exclude the API submission was proper.

4. *EPA's Last-Minute Addition to the Record*

Finally, NRDC contends that EPA violated the administrative procedure requirements of the Clean Air Act by placing in the record, after the close of the comment period and one day before promulgation of the final rule, an EPA staff paper entitled "Evaluation of Alternative Secondary Ozone Air Quality Standards". The statement accompanying the final rule indicated that this study was the primary basis for the change from an 0.08 ppm to 0.12 ppm secondary standard. 44 Fed. Reg. 8217 (1979). NRDC argues that the failure to give notice or opportunity to comment on any analysis so central to the final decision warrants invalidation of the secondary standard.

The last-minute addition to the record of a study which constituted the basis for the final secondary standard is disturbing. The study was never exposed to public scrutiny or comment. However, the procedural requirements of the Clean Air Act do not permit NRDC to raise this objection for the first time on appeal. *See Oljato Chapter of the Navajo Tribe v. Train*, 169 U.S. App. D.C. 195,

207-08, 515 F.2d 654, 666-67 (D.C. Cir. 1975). Section 307(d)(7)(B) of the Act, 42 U.S.C. § 7607(d)(7)(B) provides that:

> (B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the ground for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

The statute states that before this court may review a procedural objection the parties must raise the objection on petition for reconsideration before the EPA when the grounds for such objection "arose after the period for public comment (but within the time specified for judicial review". This reading is confirmed by the legislative history of this provision, which states in pertinent part:

> Section 307(d)(7)(B) would specify the circumstances in which a reviewing court may consider data and arguments that were not presented to the

> agency during the rulemaking. Even in such cases, however, the Agency must first be given an opportunity to pass on the significance of the materials and determine whether supplementary proceeding [sic] are called for or not. Thus, the committee bill confirms the court's decision in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).

H.R. REP. 95-294, 95th CONG., 1st SESS, 323 (1977). *See generally, Sierra Club v. Costle, supra* at 193-94.

The record before us does not suggest that any party, including NRDC, filed petitions for reconsideration with the EPA. The grounds for NRDC's objection were clear as of the date of promulgation of the final rule. Had NRDC complied with the statutory requirement of filing a petition for reconsideration, it could have commented on the staff study and the EPA could have responded during the period when the petition was pending. Because the required petition for reconsideration was never filed, we cannot reach the merits of the NRDC objection. *See generally, Sierra Club v. Costle, supra* at 200-201 & n.497.

Although we refer to a "petition for reconsideration" in this opinion, it should be noted that any formal communication to the Administrator that specifically states an objection, requests reconsideration of Agency action because of the objection, and provides notice to interested parties, would satisfy the statutory requirement for an "objection . . . raised with reasonable specificity." 42 U.S.C § 7607(d)(7)(B). The record reflects no such formal communication from NRDC.

5. *Post-Comment Period White House Contacts*

NRDC contends that a series of post-comment period oral contacts between officials of the EPA and the White House and its agencies were not documented in the docket

or the record. NRDC argues that this constitutes a violation of Clean Air Act Section 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii) (1976), which provides that:

> (ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

As we have said, a petitioner must raise a procedural objection with the EPA if this court is to consider the objection. 42 U.S.C. § 7607(d)(7)(B). This rule applies even when the grounds for the objection first became known to the petitioner after the comment period ended, but before the period for petitioning for review expired. This is evident from the statute: ". . . if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

According to NRDC, it was alerted to the White House contacts as early as February 26 and 27, 1979, when hearings on executive branch review of environmental regulations were held by the Senate Subcommittee on Environmental Pollution. (NRDC Br. at 19, n.46, 28,

n.53) The Subcommittee examined the role of White House economic advisers. The final regulations were published in the Federal Register on February 8, 1979. 44 Fed. Reg. 8202. Thereafter NRDC had sixty days to file its petition for review. 42 U.S.C. § 7607(b)(1). In that period NRDC could have petitioned the EPA for reconsideration based on its objection to the White House contracts. Because NRDC failed to exhaust the administrative remedy specifically required by the Act we may not and do not consider this objection to the Administrator's action. 42 U.S.C. § 7607(d)(7)(B); § 7607(d)(9)(D)(ii).

VI.

Conclusion

In summary, we hold that the primary and secondary standards for ozone emission are supported by a rational basis in the record. Although the EPA procedures were not a model of regulatory action, we hold that none of the alleged procedural errors warrants invalidation of the final standards.

Affirmed.

WALD, *Circuit Judge*, dissenting in part: I concur in all respects with Judge Robb's majority opinion, save one: I am troubled by the manner in which the court refuses to decide the *ex parte* issue for failure to raise it properly under section 307.

The majority opinion disposes of NRDC's challenge concerning post-comment period White House contacts by holding that NRDC failed to raise this objection before EPA in a timely manner, and is therefore precluded from doing so here under 42 U.S.C. § 7607(d)(9)(D); § 7607(d)(7)(B). EPA itself, however, nowhere claims such a bar to deciding this issue on the merits, and I find the present record inconclusive on whether this issue was appropriately brought to EPA's attention. I would therefore have posed a single interrogatory to the parties to ascertain whether a timely objection by NRDC was in fact made on this issue so as to bring it within the scope of our review under this statute.

As the majority recognizes, the relevant section, 42 U.S.C. § 7607(d)(7)(B), requires only an "objection [of central relevance] . . . raised with reasonable specificity" to require the Administrator to convene a proceeding for reconsideration.

While we may be confident here that any *formal* petitions for reconsideration would appear in the record, we cannot be as sure about the presence of other, less formal objections to the rulemaking. The latter would *not* necessarily appear in the record on appeal, because the record for judicial review as defined in section 307(d)(7)(A) does not include all post-promulgation objections. It is also possible that an objection made to the alleged *ex parte* contacts even before promulgation might not have been placed in the record as being "centrally relevant."

Without more reliable knowledge that no reasonably specific, timely objection was made by NRDC regarding post-comment period communications, I would not find the

issue barred in this court without some statement by the parties addressing this point. My suspicion that an appropriate objection may in fact have been made is fueled by (1) Environmental Defense Fund testimony in the February, 1979 hearings before the Senate Subcommittee on Environmental Pollution,[1] that it had written Administrator Costle two weeks before about White House-EPA *ex parte* contacts; and (2) EPA's own failure to object to NRDC's claims on the ground that the claims were not properly raised before the agency. EPA, in fact, defends exclusively on the merits, asserting that the post-comment period White House communications were proper and duly recorded. *See* Brief for Respondent EPA at 101-10.

In short, I do not think it reasonable to assume, on the record before us and in the absence of any such assertion by EPA, that no timely objection was made on the *ex parte* issue. I would instead have resolved this factual ambiguity in the record before deciding whether to pass on the merits of the *ex parte* issue.

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[1] *See* Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. 57 (Feb. 26, 1979) (testimony of Robert Rauch, Staff Attorney, Envt'l Def. Fund).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

CITY OF HOUSTON, TEXAS,
Petitioner

V.

ANNE M. GORSUCH, ADMINISTRATOR,
AND
ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

* * *

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BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

* * *

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the State of Texas represented herein by Mark White, Attorney General of Texas, files this its brief as amicus curiae.

INTEREST OF THE STATE OF TEXAS

Under the Federal Clean Air Act, 42 U.S.C. §7401, et. seq., the State of Texas is generally responsible for maintaining and implementing a State Implementation Plan (SIP) approved by the Environmental Protection Agency (EPA) which provides for the attainment of National Ambient Air Quality Standards (NAAQS) within the State. Currently, Texas is required by Section 172(c) of the Clean Air Act, to submit by July, 1982, Plan revisions that "assure" attainment of the ozone standard in Harris County, including Houston, by the end of 1987. Since the required revisions are primarily

governed by the standard to be acheived, the State of Texas is vitally interested in this litigation. In addition, certain questions regarding the EPA's authority in setting the standards, which should be clarified by this Court, will continue to affect the State of Texas in its efforts to comply with the Clean Air Act.

SUMMARY OF ARGUMENT

The State of Texas generally concurs with the arguments made by the City of Houston in its Petition for Certiorari, but will not repeat those arguments here. The State contends, first, that the Court of Appeals erred in holding that evidence of impossibility of attainment is irrelevant to the promulgation of a NAAQS. This holding misconstrues the decision in *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), creating an area of confusion which requires review by this Court. Second, the EPA's control strategy regulations, 40 C.F.R. §50.14(c)(7), have the effect of imposing a particular method of ozone control on the states. This imposition conflicts with the provisions of the Clean Air Act, which gives the states primary responsibility for the development of the State Implementation Plan.

ARGUMENT

I. The Agency And The Court Of Appeals Erroneously Refused To Consider Whether the Ozone Standard Will Be Attainable In The Houston Area.

The decision below has disturbed the statutory role of the EPA in setting environmental standards under the Clean Air Act. The City of Houston has argued and presented evidence that naturally occurring levels of ozone in the Houston area make attainment of the 0.12 ppm standard impossible for the indefinite future. The EPA and the Court of Appeals refused to consider this

argument, holding that impossibility of attainment is irrelevant in the promulgation of the standards. For this conclusion the Court of Appeals relied[1] upon *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), which held:

> the Administrator may not consider economic and technological feasibility in setting air quality standards . . . [because] of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals.
>
> 647 F.2d at 1149.

This position was said to be "technology forcing", i.e., combining ambitious standards with strict compliance requirements, in order to compel the development of better pollution control methods. Ultimately, then, *Lead Industries* held that the burdens complained of must be borne because doing so will, one way or another, lead to attainment. Though harsh, this approach is consistent with both the Clean Air Act's unqualified mandate that the states provide for attainment by a specified date (Clean Air Act §172; 42 U.S.C. §7472), and its apparent intent that "sources of pollutants either should meet the standard of the law or be closed down." S.Rep. No. 91-1196, 91st Cong., 1st Sess. 2-3 (1970), cited in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) at 258-9.

---

1. In turn, the holding in *Lead Industries* was based in part on this Court's decisions in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), and *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). These cases established that economic and technological factors are not to be considered in setting a technology-forcing standard. Properly speaking, the standards in those cases were not challenged as "infeasible" but merely as disutilitarian.

The position presented by the City of Houston is completely distinguishable. We are not concerned here with "economic or technological" infeasibility, but rather with a literal impossibility. The question raised by the City of Houston in the present case is whether the Act authorizes a standard that cannot be achieved regardless of the burdens assumed, including those considered in the *Lead Industries* decision. The Agency and the Court of Appeals have refused to consider this argument, holding that even if the evidence conclusively showed that attainment is impossible by any means it would be irrelevant as a matter of law.

This position is simply insupportable. First, it imputes to Congress the intent to require the states to do the impossible. Congress would no more try to regulate naturally occurring ozone levels than it would natural temperature levels. Second, the stated rationale of technology forcing is entirely absent. The Clean Air Act requires attainment of the standards and recognizes nothing short of that goal. Where attainment is not possible, the statutory sanctions cannot be avoided through greater control or improved technology. This removes an important incentive to improve air quality. Thus the decision below creates a situation that interferes with the purposes of the Act.

The potential consequences of this situation further disrupt the statutory scheme. The Act gives the states the primary discretion to develop their own State Implementation Plans. The EPA may develop its own SIP only if the state fails to submit a plan which meets the statutory requirements. Clean Air Act §110(c), 42 U.S.C. §7410(c). The decision below frees the Agency from these limitations by sanctioning impossible standards, which no SIP could ever meet. The unlimited power to set the standards is a lever by which the EPA can take over the states' role in implementation. At the same time, the states are put in a hopeless

position. The Act makes no provision for substantial compliance; the sanctions provided in the Act (such as the ban on construction of new stationary sources required by Section 110(a)(2)(I), 42 U.S.C. §7410 (a)(2)(I) are triggered by noncompliance with the NAAQS as set by the EPA. Conceding the EPA's good faith in setting the standards, the exclusion of all evidence on attainability blinds the Agency to a crucial consideration in its decision-making. There is nothing in the Clean Air Act to suggest that the EPA may ignore information on a point that would have such an impact on the states.

Thus the decision of the Court of Appeals confuses relations between the states and the EPA under the Act, and raises a conflict between impossible standards and strict compliance requirements. This conflict has been highlighted in earlier opinions by the District of Columbia Circuit. In *Natural Resources Defense Council v. EPA*, 656 F.2d 768, 785 (D.C. Cir. 1981), the Court of Appeals appeared to base its approval of water quality monitoring regulations on assurances that they would be enforced with flexibility and discretion. And in *Alabama Power Co. v. Costle*, 636 F.2d 323, 372 (D.C. Cir. 1979), the Court of Appeals purported to find an excuse from compliance where "good faith effort" had failed.[2] These opinions suggest that the D.C. Circuit has recognized and attempted to mitigate the harshness of technology forcing requirements, even where mere difficulty, and not impossibility, was involved. However, these assurances conflict with the Clean Air Act's clear

2. "Of course even a congressional mandate, such as a technology-forcing requirement based on a congressional projection of technology for the future, is subject to a justified excuse from compliance where good faith effort to comply has not been fruitful of results. That is far different from the exemption created by EPA on the basis of current technological infeasibility." 636 F.2d at 372

requirement of full compliance with the pollution standards. The decision below opens the door to a literally impossible standard, increasing the burden on the states, with no reliable prospect that enforcement of the ozone standard will be relaxed. While enforcement of the standard is not before the Court, the case at bar represents the inital departure from the statutory scheme, which will cause far greater problems in the future.

The question which remains unanswered is whether the EPA can set unattainable standards, as the Court of Appeals decision in the present case states that it can, and then insist upon strict compliance, as the Clean Air Act intends that it will. The Court of Appeals has ruled that the EPA need not even hear evidence that a given standard may be impossible to attain. This will remove the technology forcing rationale that is a key to the Act, give the EPA undue power over the State Implementation Plans, and expose the states to the statutory sanctions without hope of compliance. The decision below presents an important question of federal law, one that is central to the workings of the Clean Air Act. The outcome of this case will have national impact upon federal/state relationships, upon the public health, and upon the economy, as the costs of compliance mount. This Court should grant certiorari in order to consider and clarify these questions.

II. The Agency's Regulations Impose Specific Control Strategies on the States, Contrary to the Provisions of the Clean Air Act.

The Court of Appeals has approved EPA regulations which require, as a specific strategy for the attainment of the ozone standard, control of hydrocarbon emissions to levels set in accordance with one of four types of models. 40 C.F.R. §51.14(c)(7). This approval is at odds with the role given to the states by the Clean Air Act, and with the fundamental purpose of the Act.

Section 110 of the Clean Air Act gives the states primary responsibility in developing the State Implementation Plan. Clean Air Act, Section 110, 42 U.S.C. §7410. As long as the requirements of §110(a)(2) are met, the choice of particular control strategies lies with the states. This Court recognized the relative roles of the states and the EPA in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), wherein it is stated:

> The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.
>
> 421 U.S. at 79.

The effect of this statutory scheme is to give the states meaningful discretion in designing their plans, and preclude the Agency from requiring particular means of control.

This discretion is in accord with the purposes of the Clean Air Act and the concepts of federalism built into it. Section 101 of the Clean Air Act reflects the Congressional intent that prevention and control of air pollution at its source be the primary responsibility of state and local governments, and that the appropriate federal role consists of leadership and financial assistance. Clean Air Act, Section 101(a)(3), (4); 42 U.S.C. §7401(a)(3), (4). Accordingly, the major purposes

of the Act include provision for national research efforts, and technical and financial assistance to the states. Clean Air Act, Section 101(b)(2), (3); 42 U.S.C. §7401(b)(2), (3). The control strategy requirements associated with the ozone standard reflect a complete departure from this framework both in terms of the state/federal relationship and in terms of EPA's obligation to provide adequate technical assistance.

The regulations at issue require that the control strategy include an assessment of the amount of hydrocarbon reduction necessary to attain the ozone standard. 40 C.F.R. §51.14(c)(7). This requirement, seemingly related only to the form of information to be submitted, will in practice limit the discretion of the states in developing a control strategy. The actual effect will be to discourage the use of control methods other than hydrocarbon control, and to limit the means by which the problem is studied.

The regulations focus on hydrocarbon reductions alone as the key bit of information by which the Plan will be evaluated. While the states are technically free to pursue other means, the emphasis on hydrocarbons in the regulations will inevitably encourage the states to adopt this "approved" strategy, and direct efforts away from possible alternatives. The evidence submitted by the City of Houston suggests that control of hydrocarbons alone will not be an effective means of controlling ozone levels, and the City has argued that control of oxides of nitrogen ("NOx") may be a crucial part of an effective stategy.[3] The regulations place a redundant burden on the State and City to control hydrocarbons *in*

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3. It remains questionable whether attainment of the 0.12 standard will be possible with any strategy. But it remains important to search for the most helpful methods, to bring about the most improvement possible in air quality. That search is for the states to direct.

addition to taking such other means as they might find helpful. Under the Act it is the State's prerogative to choose the mix of control methods. The EPA has intruded on that prerogative by requiring a showing of hydrocarbon reductions.

The second effect of the requirement is to limit the means by which the problem can be evaluated. The regulations specify four models, one of which must be used to estimate the need for hydrocarbon reductions. 40 C.F.R. §51.14(c)(7). This requirement discourages the states from making an independent study by mandating the use of limited time and resources on the required studies. To argue that the states are free to undertake such additional studies as they may desire again places a redundant burden on the states, with no prospect of corresponding benefits. If state discretion under the Act is to mean anything, the states must be free to evaluate the problems and policy choices in whatever way they find appropriate, as a first step to the autonomous development of the State Implementation Plan. If these evaluations and plans can be shown to meet the requirements of the Act, the EPA has no alternative but to approve. The regulations in question go beyond that role, thus exceeding the authority given to the Agency by Congress and violating the concepts of federalism built into the Clean Air Act.

The State of Texas further believes that the Court of Appeals' approach regarding this issue is at odds with its own reasoning in the case of *Alabama Power v. Costle, supra.* There, the court sustained guideline regulations regarding diffusion modeling requirements for permit applications under the PSD program, qualifying its decision as follows:

> But though we today sustain EPA's modeling regulations, a final observation is in

> order. Of great importance is a reasoned agency response to substantial questions of fact, policy or science raised in comments on recommended models or in proposals to employ new techniques . . . . Modeling, the agency tells us, is on 'the frontiers of scientific knowledge,' but the lack of scientific certitude about modeling techniques increases rather than reduces the need for the agency to critically examine all substantial questions of fact and science emerging from the commenting process. EPA's guideline warns that all proposed deviations from the endorsed models must be fully supported, but this language should not be overemphasized, for the models presently specified in the guidelines are concededly flawed.
>
> 636 F.2d at 387-388.

In a footnote, the court then stated:

> We would associate ourselves with the observation that "decisions which are not arbitrary and capricious in the light of existing knowledge may become so by the dint of scientific advances. By its use of estimations and sparce data, the EPA creates a continuing responsibility to develop, review and apply updated and more sophisticated information." *Texas v. EPA*, 499 F.2d 289, 301 n.16. (5th Cir. 1974).
>
> 636 F.2d 388, n.116.

That concern was prompted by technical uncertainty similar to that now at issue. Texas believes that the continued focus on hydrocarbon control alone through the use of four totally vague alternative models falls far short of EPA's "responsibility to develop . . . and apply updated and more sophisticated information," and renders the present requirement arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the State of Texas believes that this case presents important issues for review and clarification by this Court, and that the petition for writ of certiorari by the City of Houston should be granted.

Respectfully submitted,

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CITY OF HOUSTON, TEXAS,
Petitioner,

v.

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

The petition for a writ of certiorari filed by the City of Houston presents two questions. On this reply, Houston will further address only the first question. The first is whether the Circuit Court of Appeals erred in its determination that the Clear Air Act permits the Environmental Protection Agency to establish National Ambient Air Quality Standards for ozone which are impossible to meet because of natural conditions not within human control. In their brief in opposition, respondents in effect enter a plea of confession and avoidance. Respondents do not deny that the decision below allows the agency to disregard evidence that it is impossible to comply with an air quality standard due to natural conditions. In-

stead, respondents suggest that Houston's evidence, which the agency below refused to consider, does not prove that Houston will be unable to comply with the ozone standards.

Respondents hold out the possibility that Houston will not find itself out of compliance due to natural conditions on a "routine" basis, and that Houston therefore will be entitled to invoke an exception from the standards for ozone. In the first place, only respondents' *ipse dixit* supports the notion that natural ozone conditions will not force Houston to exceed the standard on a "routine" basis. Second, the ozone standards do not require "routine" compliance; they require near-total compliance, permitting an average exceedance of only *one* day per year. 40 C.F.R. § 50.9(a) (1981). Third, the "exception" which respondents cite does not permit non-compliance on a less than "routine" basis. In fact, the "exception" cited does not permit non-compliance at all. That regulation provides:

> *For purposes of developing a control strategy*, data derived from measurements of existing ambient levels of a pollutant may be adjusted to reflect the extent to which occasional natural or accidental phenomena, *e.g.*, dust storms, forest fires, industrial accidents, demonstrably affected such ambient levels during the measurement period.

40 C.F.R. § 51.12(d) (1981) (emphasis added). Once the control strategy is decided upon, the states are obligated to enforce compliance. 42 U.S.C. § 7413. In short, even if, for the sake of argument, Houston's continuing ozone problems could be analogized to "dust storms, forest fires [or] industrial accidents," the regulation to which respondents refer is completely irrelevant.

Respondents also attempt to belittle Houston's concerns by referring to Houston's problem as "parochial." Houston is the fifth largest city in the United States, and, as Houston noted in its petition at 16 n.13, in the view

of the National Commission on Air Quality, as many as 32 U.S. counties will also be in violation of the ozone standards after 1987.

The second question presented by Houston's petition is whether respondents improperly imposed a control strategy upon Houston without adequately considering environmental conditions prevailing in Houston. Respondents dismiss any responsibility to devise a workable control strategy for Houston as a "parochial" concern. On this reply Houston will refer the Court to the amicus brief of the State of Texas. As Texas notes, by imposing an unworkable control strategy upon Houston through the State of Texas, respondents have unlawfully intruded upon the rights of the states under the Clean Air Act to develop their own implementation plans designed to take into account local conditions.

For the reasons stated here and in the *amicus* brief of Texas and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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